

Clemis Montali

In re)	Bankruptcy Case No. 18-30089-DM
)	
ANTHONY BLAKE PERKINS,)	CHAPTER 7
)	
)	
Debtor.)	
)	
<hr/>)	Adversary Case No. 18-03023-DM
CUCKOO'S NEST CLUB, LLC, and)	
BOOTUP VENTURES, LLC,)	
)	
Plaintiffs,)	
)	
v.)	
)	
ANTHONY BLAKE PERKINS,)	
)	
Defendant.)	

On April 30, May 1 and May 16, 2019, the court conducted a trial on the complaint filed by plaintiffs Cuckoo's Nest Club, LLC ("CN") and BootUp Ventures, LLC ("BU") and collectively with CN, "Plaintiffs", against defendant Anthony Blake Perkins

1 ("Perkins"). Plaintiffs appeared and were represented by David
2 P. Nemecek, Esq; Perkins appeared in propria persona.

3 Following the submission of post-trial briefs by both
4 sides, the court took the matter under submission. For the
5 reasons that follow, CN will be awarded a judgment of
6 nondischargeability under 11 U.S.C. § 523(a)(6) against Perkins
7 in the amount of \$665,045. In reaching this decision the court
8 points out the considerable difficulty its task was in working
9 through confusing and sometimes incomplete or inconsistent
10 exhibits, including spreadsheets and demonstrative summaries and
11 testimony of the witnesses. While the cost may have been
12 prohibitive for Plaintiffs given the losses they have suffered
13 to date on this failed enterprise and lengthy litigation in two
14 courts, the simple fact is that a comprehensive forensic
15 analysis might have produced a different result. Be that as it
16 may, the court has attempted to glean from the record the basis
17 for the result it reaches.¹

18 BU will take nothing by the complaint. Further, the court
19 will not impose any alter ego liability on Perkins, nor award
20 any prejudgment interest or punitive damages. CU is entitled to
21 its costs.

24 ¹ Plaintiffs contended emphatically that Perkins spoiled
25 evidence or otherwise engaged in conduct that should have
26 resulted in a more severe result. The evidence does not support
27 such a finding. Even if it did, there is nothing to suggest
28 that the consequence would be different.

The court has previously expressed its apology for the
delay in announcing this result and nothing more needs to be
said.

1 Because neither Perkins or his Chapter 7 trustee have
2 asserted any claims for affirmative relief or offset against
3 Plaintiffs, the court will afford no relief, nor devote any
4 further time or attention, to Perkins' arguments that payments
5 made by CN or BU to its owners should be recovered, that their
6 receipt should be explained or that Plaintiffs must be held
7 accountable for unexplained transactions involving CN or BU.

8 II. BACKGROUND²

9 The historical events that brought the parties together are
10 largely undisputed and are briefly summarized. Perkins is the
11 principal and controlling person and owner of AlwaysOn, Inc.
12 ("AO"). BU is in the business of aiding startup companies. Its
13 principals are Marco ten Vaanholt ("ten Vaanholt") and Mukul
14 Agarwal ("Agarwal"). In 2014, Perkins became acquainted with
15 ten Vaanholt and Agarwal at a business location in Menlo Park,
16 California, leased by BU. Perkins expressed an interest in
17 using outdoor space at that property for various of his own
18 business purposes. In time ten Vaanholt discussed the venture
19 that ultimately led to the formation of CN on or about September
20 4, 2014. CN was jointly owned by BU and AO, who were fifty
21 percent interest owners and its two managing members. Perkins
22 signed the operating agreement and a management agreement for CN
23 on behalf of AO in November, 2014. While the management
24 agreement did state in Paragraph 2.3 that Perkins would be
25 entitled to 30% commission on membership and sponsorship sales
26 that he generated, it further provided in Paragraph 2.8 that he

27
28 ² The following discussion constitutes the court's findings of
fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 would defer payment of those commissions until requisite cash
2 reserves had been realized and the commission could be paid from
3 net profits.

4 The business plan of the founders was to recruit members
5 and corporate sponsors to participate in a social club catering
6 to entrepreneurs, financiers, and artists in Silicon Valley. At
7 that social club the members would have an opportunity to
8 network with one another and explore potential business
9 opportunities. There were four types of memberships for
10 differing enrollment amounts, and one type of corporate
11 sponsorship, also in differing amounts

12 Prior to forming CN, Perkins on the one hand and ten
13 Vaanholt and Agarwal on the other had no prior business dealings
14 with one another. The business appears doomed from the outset
15 despite initial interest from prospective members and sponsors.
16 From the very beginning of their relationship, AO was almost
17 perennially cash poor. That situation had to be a red flag for
18 CN and its principals. It also appears that some of the basic
19 concepts of how they were to conduct their business was never
20 fully explored. For example, Perkins and AO were obligated to
21 turnover to CN cash revenues obtained from potential members and
22 sponsors "immediately or, at a minimum, no later than two weeks
23 after receipt." And even then, the consequence to AO for late
24 payment was the accrual of interest at 12%, not termination of
25 the relationship. Clearly, therefore, Perkins and AO had
26 unfettered temporal control of all revenues designated for CN
27 from prospective members and sponsors. He and AO were not
28 prohibited from comingling those revenues from any other of

1 their revenue sources. Most revenues from members and sponsors
2 came into AO via an online account AO controlled.

3 On the other hand, ten Vaanholt and Agarwal adamantly
4 refused to guarantee a \$10 million line of credit provided to AO
5 by its merchant bank because the CN's business was a new
6 business. Later on Perkins complained vociferously about the
7 refusal of those two to provide that guarantee but he was
8 charged with knowledge of their position from the outset.
9 After-the-fact complaints are as hollow as their complaints
10 about his freedom to commingle cash revenues for at least two
11 weeks without consequences. There also appears to be a history
12 of disagreement among the parties about myriad other business
13 matters

14 The stories depart and remain unresolved concerning: was
15 Perkins entitled to a salary for his services to AO³; was he
16 entitled to withhold payments of revenues designated for CN on
17 an account of commissions he earned; was AO entitled to collect
18 and commingle non-CN revenues with those of CN; were rents or
19 loans allowed to be paid or repaid by CN to BU?

20 CN's exhibits reflect that in 2014 AO transferred \$140,000
21 to CN, compared to total receipts of \$591,000, creating a
22 shortfall of \$451,000.

23 By August 30, 2015, CN was in desperate need of funds.
24 Nonetheless, in June 25, 2015, the parties executed a license

25
26 ³ A July 10, 2012 letter agreement between Perkins and AO
27 (signed by Perkins) says he would be paid \$425,000 annually.
28 There is no proof that Plaintiffs knew of this agreement. In
any event, Perkins apparently did not pay himself a salary from
CN's entitled receipts.

1 agreement obligating CN to pay \$33,000 per month rent to BU;
2 \$21,000 per month was to be deferred.

3 As of the third quarter of 2015, ten Vaanholt suspected
4 that AO was not turning over all revenues to CN. He was aware
5 of a \$100,000 shortfall at that time. Part of his concerns were
6 based on reports from members who had paid for their memberships
7 that were not reflected in CN's records.

8 As of August 30, 2015, ten Vaanholt estimated a total
9 shortfall of \$866,785 received by AO but not remitted to CN.

10 By mid November 2015, ten Vaanholt asserted in writing that
11 AO was in breach of the operating agreement. On December 15,
12 2015, he terminated AO's membership in CN.

13 Subsequently Plaintiffs filed an action against AO in San
14 Mateo Superior Court against AO and obtained a default judgment
15 for \$3.7 million. Perkins was not named as a defendant.

16 Perkins filed Chapter 7 on January 25, 2018.

17 III. DISCUSSION

18 A. Nondischargeability under 11 U.S.C. § 523(a)(2).

19 Plaintiffs properly summarized the applicable law to
20 determine whether Perkins' liability to either of them is
21 nondischargeable under Section 523(a)(2). The burden is on the
22 creditor to establish all five elements of that section, namely
23 fraudulent omission or deceptive conduct; knowledge of the
24 falsity by the defendant; an intent to deceive; justifiable
25 reliance by the creditor, and damages. Here there is no
26 question that CN has suffered damage. Beyond that, Plaintiffs
27 have not established that they justifiably relied upon any such
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1 falsity or deceptiveness on the part of Perkins that led to
2 their losses.

3 The reason the court reaches this conclusion is found not
4 only in the specific dearth of evidence presented on this issue,
5 but also based upon having observed ten Vaanholt and Perkins at
6 trial and drawing upon its own experience with participants to
7 failed business ventures. This case is not about stealth and
8 deceit, fraud and deception, but more about a business attempt
9 that was ill conceived, primarily because neither side had done
10 its necessary due diligence to know with whom they were getting
11 involved. At the outset, the three people involved were
12 attempting to build a profitable business enterprise. The fact
13 that it failed, that the Plaintiffs suffered substantial losses
14 and Perkins ended up in bankruptcy does not mean that Perkins
15 knowingly and intentionally set out to defraud ten Vaanholt and
16 Agarwal and their business entities, nor did they justifiably
17 rely in any way on any intentional misrepresentations.

18 More specific with reference to the course of dealing,
19 before the management agreement was even executed in May, 2015,
20 AO already owed CN approximately \$630,000. To repeat what was
21 just said, this is more consistent with a failed venture rather
22 than intentional wrongdoing against innocent victims. Stated
23 otherwise, there simply was none of the normally required
24 elements of intentional fraud, conduct or deceit by Perkins that
25 would support findings and conclusion of nondischargeability
26 under 11 U.S.C. § 523(a)(2).

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1 B. Nondischargeability under 11 U.S.C. § 523(a)(6).

2 Plaintiffs also accurately summarized the necessary
3 elements they must prove to establish nondischargeability of any
4 of their claims under Section 523(a)(6). Specifically, they
5 must establish that Perkins' conduct was willful and malicious.
6 Willful means that Perkins had a subjective motive to inflict
7 injury or believed or should have believed that the injury was
8 substantially certain to result from his own conduct. In
9 addition, the injuries must be willful, namely done
10 intentionally, necessarily causing injury, and done without just
11 cause or excuse.

12 Consistent with the court's observation about the failed
13 joint venture by the parties, the evidence does not support the
14 conclusion that the failure of CN translates generally to
15 personal liability of a debtor in bankruptcy for willful and
16 malicious injury. But it does, however, implicate Perkins'
17 liability for what must be characterized as the wrongful
18 appropriation or conversion of monies that he knew should be
19 turned over to CN but in fact were kept for his own or AO's
20 purposes. More specifically, the evidence establishes that
21 Perkins had no justification whatsoever for paying himself
22 commissions from the funds AO received and was obligated to
23 remit to CN.

24 The same conclusion follows from Perkins' credit for bank
25 charges, what CN established were double booked fees, and the
26 remaining amount Perkins conceded in the post-trial brief was an
27 unexplained balance.

1 The court finds that Perkins knowingly and intentionally
2 converted revenues collected that should have been turned over
3 to CN. For that reason, the court concludes that a portion of
4 CN's claim is nondischargeable under § 523(a)(6). To put these
5 issues to rest, the court resolves the matters as follows:

6 Claimed by BU:

7 Lost rent and unpaid loans (\$589, 337) - DISALLOWED. These
8 amounts may not be recovered from Perkins under any theory
9 because there is no satisfactory proof to lead the court to find
10 that he knowingly or intentionally "converted" any of those
11 amounts.

12 Claimed by CN:

13 Total of memberships and sponsorships collected by AO:

14 \$1,051,500 plus \$435,500 = \$ 1,487,000

15 Less collections turned over to CN: \$ (360,465)

16 Shortfall: \$ 1,126,535

17 Less direct collection from Jeffries \$ (25,000)

18 Net claim: \$ 1,101,535

19
20 The court accepts Perkins' explanation

21 (Post-trial brief, P. 11) of \$ 142,500

22 direct investments in AO and \$ 256,250 AO-

23 only sponsorship events resulting in a

24 credit of: \$ (398,750)

25 Adjusted Net Claim: \$ 702,785

26 Credits asserted by Perkins but disallowed by court:

27 Commissions \$ 226,960

28 Bank charges \$ 22,656

Alleged double booked fees	\$ 294,967
Outstanding unexplained balance	\$ 120,462
Total non-dischargeable claim	\$ 665,045 ⁴

That said, and as noted at the outset, Perkins' contention that any of his conduct was justified by other conduct by Plaintiffs is misplaced and is rejected.

C. Perkins is not the alter ego of AO.

Plaintiffs have not even come close in establishing that Perkins is the alter ego of AO and that he is liable for any amount in excess of what the court awards here. In particular he is not liable on account of the default judgment Plaintiffs have obtained against AO. In their post-trial brief, Plaintiffs recite the familiar litany of elements to establish alter ego, including commingling funds, treatment by an individual of assets of a corporation as its own; failure to follow corporate formalities; failure to adequately capitalize a corporation, and diversion of assets to the detriment of creditors. The problem is that Plaintiffs have not established by admissible and competent evidence any of those elements. Whatever commingling Perkins may have caused pertains to revenues of AO that were or were not earmarked for CN, but none from his own personal sources. Similarly, he has not treated his own personal assets of as those of AO (or CN). Further, there was no evidence that

⁴ The court cannot reconcile the remaining small difference between the Net Claim of \$ 1,101,535, the allowed credits of \$398,750 and the non-dischargeable amount of \$665,045. It resolves that difference in Perkins' favor as consistent with his entitlement to a fresh start even though he remains saddled with a sizeable amount of non-discharged debt.

1 he individually ignored corporate formalities on behalf of his
2 entity, AO, nor that AO was inadequately capitalized or that
3 Perkins diverted assets from that entity to the detriment of
4 creditors of that entity.⁵

5 IV. CONCLUSION

6 For the reasons summarized above about the nature of the
7 relationship among the principals and the inability of
8 Plaintiffs to persuade the court that Section 523(a)(2) has been
9 implicated, the court will not impose punitive damages on
10 Perkins as requested. There is simply no showing that his
11 conversion of the amounts awarded establish the traditional
12 elements of malice and oppression that could justify any award
13 of punitive damages.

14 The court is concurrently issuing a judgment of
15 nondischargeability consistent with this memorandum decision.

16 **END OF MEMORANDUM DECISION**
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25 ⁵ The court previously dismissed Plaintiffs' cause of action
26 under 11 U.S.C. § 523(a)(4), citing *Double Bogey v. Enea*, 794
27 F.3d 1047, (9th Cir. 2015). It would appear from the brief
28 that Plaintiffs are trying to revisit that legal analysis and
conclusion, but they will not be successful here.

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